

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC
OF SRI LANKA**

*In the matter of an Appeal in terms of
section 331 (1) of the Code of Criminal
Procedure Act No- 15 of 1979, read with
Article 138 of the Constitution of the
Democratic Socialist Republic of Sri Lanka.*

Court of Appeal No:

CA/HCC/0274/16

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

High Court of Colombo

Case No: HC/5233/2010

Jinendra Prabhath Liyanage

ACCUSED

AND NOW BETWEEN

Jinendra Prabhath Liyanage

ACCUSED-APPELLANT

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12

RESPONDENT

Before : Sampath B. Abayakoon, J.
: P. Kumararatnam, J.

Counsel : Rahul Ruwanara Jayathilleke for the Accused
Appellant
: Janaka Bandara, DSG for the Respondent

Argued on : 23-03-2023

Written Submissions : 05-12-2017 (By the Accused-Appellant)
: 16-03-2018 (By the Respondent)

Decided on : 25-05-2023

Sampath B Abayakoon, J.

The accused appellant (hereinafter referred to as the appellant) was indicted before the High Court of Colombo on two counts under the provisions of the Poisons, Opium and Dangerous Drugs Ordinance (The Ordinance) as amended by the Amendment Act No. 13 of 1984.

He was charged for trafficking 13.56 grams of Heroin, which is a prohibited drug, on 24th September 2008 at Borella, an offence punishable with life imprisonment or death in terms of the Ordinance.

He was also charged with having in his possession, the same quantity of the drug at the same time and at the same transaction, which is also an offence in terms of the Ordinance, which carries a similar penalty as mentioned above.

After trial, the learned High Court Judge of Colombo found the appellant guilty as charged of his judgement dated 01-09-2016, and he was sentenced to life in prison.

The appellant preferred this appeal being aggrieved of his conviction and the sentence.

The Grounds of Appeal

At the hearing of this appeal, the learned Counsel for the appellant formulated the following grounds of appeal for consideration of the Court.

- (1) The prosecution failed to prove the chain of the custody of productions beyond reasonable doubt.
- (2) The learned High Court Judge failed to consider the inherent improbabilities of the story of the prosecution.
- (3) The learned High Court Judge exceeded the power conferred upon him by section 165 of the Evidence Ordinance, and thereby denied a fair trial towards the appellant.
- (4) The learned High Court Judge failed to consider *inter se* and *per se* contradictions in the prosecution evidence.
- (5) The learned High Court Judge failed to analyze the evidence of the prosecution and that of the defence in the correct perspective.

Facts in Brief

The facts that led to the arrest of the appellant as revealed in evidence can be summarized in the following manner.

PW-01 was a sub-inspector attached to the Police Narcotics Bureau (PNB) on the day relevant to this incident, namely 24th September 2008. He, along with 6 other officers attached to PNB has left their station at 7.50 in the morning to conduct a raid in Peliyagoda area, which was unsuccessful.

Around 12.45 hours, PC-13158 Niroshan who was a member of his team that went on the raid has informed PW-01 that he received an information of a Heroin trafficking in Borella. PW-01 has not revealed to the trial Court the exact information received by PC Niroshan but it was his evidence that he and his team left towards Borella after receiving the information. They have stopped

their vehicle near Lankaramaya Temple in Borella and walked up to the railway crossing where he has met up with the informant of PC Niroshan. PW-01 and PC Niroshan has been informed by the informant that a person called 'Sudu' would be coming this way with Heroin.

According to PW-01, he has met the informant at 13.20 hours. PW-01 along with PC Niroshan and the informant had waited at the place where they met for few minutes and at 13.25 hours, the informant has pointed his hand towards a person who was coming towards them about 50 meters ahead and had informed that he is the person called Sudu. After showing the person, the informant had left them. Accordingly, PW-01 and PC Niroshan has stopped the person shown by the informant and searched him, where they have found a parcel inside the right-hand front side pocket in the denim trouser he was wearing. Upon inspection, they have found the substance inside to be Heroin and the suspect who is the appellant has been arrested.

He has identified him as Jinendra Prabhath Liyanage *alias* Suda. After the arrest, he has been taken to his house. It was the evidence of PW-01 that his house was not searched, but he was taken to the house for the purpose of informing the arrest to his household members.

When weighed at the PNB, it has been found that the substance recovered from the possession of the appellant had 70 grams and 500 milligrams. After weighing the productions, PW-01 has taken steps to seal them following the due procedure and had handed over the productions to the production officer of the PNB, namely Sub-Inspector Samarakoon at 16.20 hours on 24th September 2008.

The position taken up by the appellant during the trial had been that he was never arrested near the railway crossing as claimed by the prosecution witnesses, but at his house while sleeping after having consumed liquor. It has been the position of the appellant that police party came and searched the

house and although they failed to recover anything, he was arrested and the substance was introduced upon him.

The prosecution has called PC-13158 Danuka Niroshan Perera (PW-02) to corroborate the evidence of PW-01. He has confirmed that he along with PW-01 who was his superior officer and another team of officials left the PNB in the morning for a raid, which was initially unsuccessful.

It was his evidence that he received an information at 12.40 hours by a personal informant of him that a person called Kudu Prabath from Wanathamulla area of Borella is carrying Heroin, and if he can come quickly, the said person can be pointed out. As the informant was a trusted source of information, PW-02 has apprised PW-01 about the information and accordingly they have gone towards Borella and stopped the vehicle near the Lankaramaya Temple. PW-01 and 02 has walked towards the railway crossing to meet the informant and had met up with him. While they were talking to each other, the informant had pointed out a person who was coming from the direction of the Sarawanamuththu playground towards them about 40 meters away. The person pointed out by the informant has been stopped and searched where they have recovered a parcel of Heroin from the side pocket of the trouser he was wearing.

PW-01 has taken charge of the suspected substance and had arrested the suspect whom he has identified as the appellant before the trial Court. He has explained the procedure followed by them to weigh the productions, seal them and to handover to the production officer of PNB.

It had been his position that when they went to Borella and walked towards the rail gate, the informant had been already waiting for them there, and they talked for about 10 minutes before the informant pointed out the appellant as the person carrying Heroin. It needs to be noted that although in his evidence in chief, PW-02 has stated that the information received by him was to the

effect that a person called Kudu Prabath would be coming with a parcel of Heroin, under cross-examination, what he has stated was that the information received by him was to the effect that a person called Wanathamulle Sudu is bringing Heroin to be handed over to another person.

At the trial, the prosecution has led the evidence of the Government Analyst to confirm that the substance produced for analysis had a pure quantity of 13.56 grams of Heroin. The prosecution has also led evidence of the other relevant witnesses to substantiate the prosecution case.

When the appellant was called for a defence at the conclusion of the prosecution case, he has chosen to give evidence under oath. It had been his evidence that on the day of his arrest, he was sleeping at his home and a police party came to inquire about his brother called Prasanna. It had been his position that since the police party could not find his brother Prasanna, he was assaulted and arrested, taken to the PNB and Heroin was introduced upon him.

Consideration of the Grounds of Appeal

In his first ground of appeal, the learned Counsel for the appellant contended that the prosecution has failed to prove the chain of custody of productions beyond reasonable doubt. It was his position that although PW-01 has claimed that he handed over the productions to Production Officer of PNB, namely Sub-Inspector Samarakoon, on 24th September 2008 at 16.20 hours, the prosecution has failed to prove the chain of custody up to the point where the productions had been handed over to the Government Analyst on 30th September 2008.

It is clear from the evidence led at the trial, by the time this matter was taken up for trial, the relevant Production Officer who had been named, as PW-03 in the indictment was deceased. The prosecution has called a Chief Inspector attached to the PNB (PW-06) to produce the notes made by SI Samarakoon

while working at the PNB in relation to this action in terms of section 32 of the Evidence Ordinance. He has confirmed that SI Samarakoon has received the productions on 24-09-2008, and the same officer has taken the productions to the Government Analyst on 30-09-2008 and had handed over the same under Government Analyst Reference Number CD 2837/08 to Assistant Government Analyst V. S. Rajasekara. The same officer has taken the productions from the Government Analyst after its analysis and taken them to the PNB on 13-08-2010.

When this case was mentioned for further trial on 01-07-2016, the Counsel who represented the appellant had agreed to admit the relevant notes made by SI Samarakoon in terms of section 420 of the Code of Criminal Procedure Act.

For the reasons set out above, I find no merit in the argument that the prosecution has failed to prove the custody of the productions. It is clear from the evidence that after the productions were handed over to the Production Officer of the PNB, the productions have been kept under the custody of the same officer until he handed over the productions to the Government Analyst.

Having determined the 1st ground of appeal urged, I will now proceed to consider the 2nd, 4th and the 5th grounds of appeal together as they are interconnected.

The contention of the learned Counsel for the appellant was that the way the prosecution witnesses claim that the informant met them and pointed out the appellant was improbable given the fact that the stand of the appellant had been that he was not arrested near the railway crossing as claimed by the prosecution witnesses.

It was his view that it is impossible to believe that an informant would expose himself in a manner stated by the witnesses given the facts and the circumstances relevant to this case. According to PW-01's evidence, he has received the information from a known informant of PW-02. PW-02 has stated

that his informant was a trusted and reliable person which shows that the informant has provided previous information to the police.

According to the evidence, the informant has met PW-01 and 02 near the railway crossing that runs across Lesley Ranagala Mawatha in Borella. It is a well-known fact that this area is a highly densely populated area where various illegal activities take place. The witnesses speak about the informant who waited near the railway crossing for them and having engaged in a conversation for about 10 minutes before he pointed out the appellant by a hand gesture. When the appellant was shown to the witnesses, according to PW-01's evidence, the appellant was about 50 meters away and according to PW-02, it was about 40 meters, which shows that at the time the informant had allegedly pointed out the appellant, they were within a distance where each other can be identified.

This incident had happened in the broad daylight. It is my considered view that any informant, especially in drug related matters, would be extremely careful not to blow his cover, as if his identity is exposed, he will have to face disastrous consequences. Under the circumstances, it is hard to believe of an informant waiting for about 10 minutes with the police officers, talking to them and showing the appellant in the manner described by the witnesses. It is quite possible that if it happened in the manner narrated in evidence, there would be a high probability for the appellant to see the informant before he left the scene or he can very well suspect that it was the informant who provided this information which led to his arrest as it was soon after the informant left, he was arrested.

Although the police officers claim that they were in civilian clothes, for a seasoned criminal it is possible to distinguish law enforcement officers from normal civilians. Under the circumstances, I am not in a position to believe the evidence of PW-01 and 02 into the manner they claimed that the appellant was pointed out by the informant.

It was the evidence of the appellant that he was never taken into custody near the railway crossing as claimed by the witnesses, but while sleeping at his home. Since the appellant has given evidence under oath and faced the test of cross-examination, his evidence must be considered giving the same value as that of the prosecution.

Another matter which concerns this Court is that the alleged information received by PW-02. The PW-01 in his evidence in chief has stated that the information received was that a person called Sudu is dealing in Heroin. However, PW-02 who is the officer alleged to have received the information had stated about the information in the following manner.

“එතන රැදී සිටීමේදී පැය 12.40 ට පමණ මාගේ පුද්ගලික ඔත්තුකරුවෙක් දැනුම් දුන්නා මගේ ජංගම දුරකතනයට බොරැල්ල වනාන්තරයේ ප්‍රදේශයේ සිට කුඩු ප්‍රහාර් නමැති පුද්ගලයෙක් හෙරොයින් අරන් යනවා හැකි ඉක්මනින් ආවොත් එයාව පෙන්නලා අල්ලලා දෙන්න පුළුවන් කියා. ඒ එම අවස්ථාවේදී ඔහුගෙන් විස්තර අසලා මට සාර්ථක තොරතුරු දීලා තිබෙන නිසා මම ඒ ගැන සටහනක් යොදලා මම වෑන් එකෙන් බැහැල විජේසිංහ මහතාට දැනුම් දුන්නා.”

(At page 114 of the appeal brief evidence given on 23-04-2015)

If the information received was about a person called Kudu Prabhath and if PW-02 informed that fact immediately to his superior officer who was PW-01, I find no reason for PW-01 to give evidence and claim what the PW-02 told him was that a person called Sudu is dealing in Heroin.

PW-02, has given his evidence in chief on 23-04-2015 and partly subjected to cross-examination, his further cross-examination had commenced only on 04-11-2015 more than 4 months after his initial evidence. On the said day, apparently realizing the discrepancy in the evidence in relation to the information received, he has spoken about a person called Sudu in the following manner.

“පර : ඒ අවස්ථාවේදී තමුන්ගේ තොරතුරුකරු ඔහු දෙසට අත දිගු කරලා පෙන්නලා මොකක්ද කියන්නේ?”

උ : අර එන්නේ සුදු කියල කියනවා.”

(At page 144 of the appeal brief)

“පර : තොරතුරුකරු හඳුනන පුද්ගලයෙක්ද?”

උ : අර එන්නේ සුදු කියලා මට පෙන්වා දුන්නා. ඊට පස්සේ ඔහු පසුපසට ගියා. ඊට පස්සේ අපි ඉස්සරහට එන පුද්ගලයාව විජේසිංහ මහතා අල්ලා ගත්තා.”

(At page 149 of the appeal brief)

At nowhere in his evidence, PW-02 has explained why he changed his evidence given in his evidence in chief as to the information received to match what was stated by PW-01 in his evidence.

Apart from the above, the prosecution witnesses have stated that after the arrest of the appellant, they took him to his house only to inform a household member that the appellant was arrested, but they did not search his house. It is doubtful as to why the raiding party did not search the house of the appellant after going there, as it would be the normal procedure of PNB officials when a person is arrested allegedly for trafficking Heroin.

It is the view of this Court that taken all these instances cumulatively, a doubt invariably would arise in relation to the reliability of the evidence given by the witnesses in Court.

I am in no position to agree with the contention of the learned Deputy Solicitor General (DSG) that such hypothetical situations should not be considered as it can also be the way the witnesses said that the informant engaged with them and showed the appellant, enabling them to arrest him.

It is the view of this Court that the probability factor of a witness statement is an essential requirement that needs to be looked at by a trial Court in a criminal action.

In the case of **Alim Vs. Wijesinghe (S.I. Police, Batticaloa) 38 CLW 95**, it was held that,

“Where the same facts are capable of an inference in favour of the accused and also an inference against him, the inference consistent with the accused’s innocence should be preferred.”

I find that the learned High Court Judge in his judgement other than determining that the evidence does not create a doubt in relation to the prosecution case, has failed to consider the probability factor of the evidence by analyzing the evidence of the relevant witnesses in its correct perspective.

I find that the learned High Court Judge has failed to view the evidence of both parties as a whole and analyze them in its correct perspective to come to his findings other than considering the evidence separately to each other and determining that the evidence of the accused and the position taken up by him cannot be accepted.

In the case of **The King Vs. W. P. Buckley 43 NLR 474**, it was stated by **Howard, C.J.:**

“In arriving at a verdict of guilty, the majority of the jury must have viewed the evidence in sections accepted and convicted the appellant on those parts that were satisfactory and disregard those facts that pointed to the improbability of the story put forward by the Crown. The jury should have viewed the evidence as a whole. If they had done so, we are of opinion that they must have had a reasonable doubt as to the guilt of the appellant. The verdict is in our opinion, unreasonable, in as much as taken as a whole the evidence does not support the conviction.”

It is clear from the judgement that the learned High Court Judge had been greatly influenced by the weaknesses of the defence case put forward by the appellant. He has commented extensively about the reasons as to why the prosecution witnesses had no reason to falsely implicate the appellant. He has also considered in detail as to why the appellant has failed to complain to a senior police officer, to the Court, and other relevant agency, if the appellant was falsely implicated to the charge in determining that the appellant's evidence does not create a reasonable doubt as to the prosecution case.

In other words, it appears that the learned High Court Judge has compared the evidence of the defence as against the evidence of the prosecution which is a clear misdirection.

In the case of **James Silva Vs. The Republic of Sri Lanka (1980) 2 SLR 167**, the trial Judge stated, "I had considered the defence of the accused and I hold that it is untenable and false in the light of the evidence led by the prosecution."

Held:

"There is a serious misdirection in law. It is a grave error for a Trial Judge to direct himself that he must examine the tenability and truthfulness of the evidence of the accused in the light of the evidence led by the prosecution. To examine the evidence of the accused, in the light of the prosecution witnesses is to reverse the presumption of innocence. It is also worth mentioning that the learned High Court Judge has considered the weaknesses of the defence case extensively in determining that there is no doubt as to the prosecution case. It is trite law that the prosecution must stand on its own legs and it cannot derive any strength from the weaknesses in the defence."

In the case of **Kalinga Premathilake Vs. The Director General of the Commission to Investigate Allegations of Bribery or Corruption, SC Appeal No. 99/2007 decided on 30-07-2009**, it was held,

“What needs consideration now is when the evidence led for the prosecution in this case is closely scrutinized, whether it would be satisfied that prosecution had discharged the burden of proving the case beyond reasonable doubt. If not, the appellant is liable to be acquitted of the charges. The prosecution must stand or fall on its own legs and it cannot derive any strength from the weaknesses in the defence, and when the guilt of the accused is not established beyond reasonable doubt, he is liable to be acquitted as a matter of right and not as a matter of grace or favour.”

In the Indian case of **Narendra Kumar Vs. State (NCT of Delhi), AIR 2012 SC 2281**, the Indian Supreme Court held,

“Prosecution case has to stand on its own legs and cannot take support from the weaknesses of the case of defence. However great the suspicion against the accused and however strong the moral belief and conviction of the Court, unless the offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for an offence. There is an initial presumption of innocence of the accused and the prosecution has to bring home the offence against the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt.”

For the reasons as considered above, I find merit in the considered grounds of appeal, which entitle the appellant to succeed in his appeal.

Although I find reasonable merit in the 3rd ground of appeal where the appellant has contended that he was denied of a fair trial because of the excessive questioning of the appellant when he gave evidence in Court by the

learned trial Judge with a prejudicial mind, I find it would not be necessary to consider the said ground of appeal further as the appeal by the appellant would be successful on the earlier considered grounds of appeal.

Accordingly, I allow the appeal and acquit the appellant of the charges for which he was convicted.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal